Supreme Court U.S.
FILED
DEC 13 2002
OFFICE OF THE CLERK

No. 02-732

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

DONALD F. FLEMING, *et al.*,
Petitioners,

v.

JEFFERSON COUNTY SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

KEVIN J. HASSON
Counsel of Record
ROMAN P. STORZER
ANTHONY R. PICARELLO, JR.
DEREK L. GAUBATZ
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Ave., N.W.
Suite 605
Washington, D.C. 20036
Phone: (202) 955-0095
Counsel for Amicus

December 13, 2002

13 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE TENTH CIRCUIT'S SANCTIONING OF VIEWPOINT DISCRIMINATION IN THE SCHOOL SETTING REPRESENTS A RADICAL DEPARTURE FROM THIS COURT'S FREE SPEECH JURISPRUDENCE 3

II. THE TENTH CIRCUIT'S HOLDING EXACERBATES THE CONFUSION AMONG THE CIRCUITS AS TO WHETHER *HAZELWOOD* PERMITS VIEWPOINT DISCRIMINATION 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) 5

Brody v. Spang, 957 F.2d 1108 (3d Cir. 1992) 7

C.H. v. Oliva, 990 F. Supp. 341 (D.N.J. 1997), *aff'd*, 166 F.3d 1204 (3d Cir. 1998), *reh'g granted, opinion withdrawn*, Apr. 16, 1999, *on reh'g*, 195 F.3d 167 (3d Cir. 1999), *reh'g en banc granted, opinion vacated*, 197 F.3d 63 (3d Cir. 1999), *aff'd by an equally divided court in part, vacated and remanded in part*, 226 F.3d 198 (3d Cir. 2000), *cert. denied sub nom. Hood v. Medford Township Bd. of Educ.*, 121 S. Ct. 2519 (2001) 2, 8, 9

Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788 (1985) 4, 5, 7

Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000) 8

Fleming v. Jefferson County Sch. Dist., 298 F.3d 918 (10th Cir. 2002) ..... *passim*

Gernetzke v. Kenosha Unified Sch. Dist. No. 1, 274 F.3d 464 (7th Cir. 2001) 8

Good News Club v. Milford Central School, 533 U.S. 98 (2001) 5

Good News/Good Sports Club v. School Dist. of City of Ladue, 28 F.3d 1501 (8th Cir. 1994) 7

Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988) ..... *passim*

Hedges v. Wauconda, 9 F.3d 1295 (7th Cir. 1993) 7

Kincaid v. Gibson, 191 F.3d 719 (6th Cir. 1999), *rev'd and remanded on other grounds*, 236 F.3d 342 (6th Cir. 2001) (en banc) 8

Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) 7

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) 5

Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996) 8

Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist., 941 F.2d 817 (9th Cir. 1991) (en banc) 7, 8

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 5

Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995) 5

Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989) 6

Silano v. Sag Harbor Union Free School Dist. Bd. of Educ., 42 F.3d 719 (2d Cir. 1994) 7

Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993) 4, 8

Widmar v. Vincent, 454 U.S. 263 (1981) 5

IN THE

Supreme Court of the United States

October Term 2002
No. 02-732

DONALD F. FLEMING, *et al.*,
Petitioners,

v.

JEFFERSON COUNTY SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Petitioners pursuant to Rule 37.3 of this Court.[1]

[1]All parties have consented to the filing of this brief, and their letters of consent accompany this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* and its members made any monetary contributions to the preparation or submission of this brief.

The Becket Fund is a bipartisan and interfaith public-interest law firm that protects the free expression of all religious traditions. *Amicus* is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of students and other individuals and institutions to speak on matters from a religious viewpoint without their speech being censored because of that viewpoint. For example, *amicus* represented the student plaintiff whose free speech rights were at issue in the Third Circuit's *vacated* opinion in *C.H. v. Oliva*, 195 F.3d 167 (3d Cir. 1999), *reh'g en banc granted, opinion vacated*, 197 F.3d 63 (3d Cir. 1999), an opinion on which the Tenth Circuit heavily relied in this case. *See Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 926-27 (10th Cir. 2002).

Our present brief addresses the limited issue of whether this Court should grant the Petition for *certiorari* on the first question raised by Petitioners:

> Whether *Hazelwood School District v. Kuhlmeier* permits viewpoint-based discrimination against religious speech where the speech, consisting solely of private expression, is deemed by school officials to be "school-sponsored."

Amicus presents no opinion on whether this Court should grant the petition for *certiorari* on the second question raised by Petitioners. Because of the narrow focus of this brief, *amicus* believes this brief will complement and not duplicate the briefs of the parties and so prove helpful to the Court in its resolution of this case.

SUMMARY OF ARGUMENT

The Tenth Circuit's answer to Petitioners' first question, *i.e.*, that viewpoint discrimination is permissible

without a showing of compelling government interest, represents a radical departure from this Court's Free Speech jurisprudence and exacerbates the confusion among the Circuits as to whether *Hazelwood* permits viewpoint discrimination. Accordingly, this Court should grant *certiorari* on this question in order to ensure conformity by the lower courts to this Court's Free Speech jurisprudence, and to bring uniformity to the Courts of Appeals, the majority of which hold that *Hazelwood* does not permit censorship of student speech based on viewpoint.

ARGUMENT

I. The Tenth Circuit's Sanctioning of Viewpoint Discrimination in the School Setting Represents a Radical Departure from this Court's Free Speech Jurisprudence.

In holding that school-sponsored student speech may be censored on the basis of viewpoint, the Tenth Circuit purported to rely on this Court's decision in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988). *See Fleming*, 298 F.3d at 926. However, *Hazelwood* dealt with the issue of *content-based* or *subject matter-based* restrictions on the student speech in a school-sponsored newspaper that was part of the school curriculum. It did not, as the Tenth Circuit held, provide any support for imposing the much more invidious censorship of prohibiting speech because of the *viewpoint* it expresses. In *Hazelwood*, the Court specifically held:

> [E]ducators do not offend the First Amendment by exercising editorial control over the *style and content* of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

484 U.S. at 273 (emphasis added). While this Court found that a school could restrict discussion of pregnancy and divorce in general (a content-based restriction), *see id.* at 274, it nowhere suggested that the school could have allowed an article discussing the merits of divorce from one perspective but forbidden another article from a religious perspective (an obvious viewpoint-based restriction).

The Tenth Circuit's reliance, *Fleming,* 298 F.3d at 928, on the absence of any discussion of viewpoint discrimination in the *Hazelwood* majority opinion to support its approval of viewpoint-based censorship of school-sponsored student speech is severely misplaced. The Tenth Circuit simply overlooks that no party in *Hazelwood* disputed the impermissibility of viewpoint restrictions because the school officials in that case *conceded* that any control they exercised over school-sponsored student speech must be viewpoint neutral. *See Hazelwood,* 484 U.S. at 287 n.3 (Brennan, J., dissenting) ("Petitioners themselves concede that '[c]ontrol over access' to Spectrum is permissible only if 'the distinctions drawn . . . are *viewpoint neutral.*'" (emphasis added)).[2]

Hazelwood followed directly from *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 806 (1985), which held that content-based discrimination—that is, discrimination based on subject matter and speaker identity—in a non-public forum is permissible "so long as

---

[2]The First Circuit's dicta in *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (cited by the Tenth Circuit, *see Fleming,* 298 F.3d at 927), stating that *Hazelwood* does "not require that school regulation of school-sponsored speech be viewpoint neutral" also appears to have overlooked the school's concession in *Hazelwood* that viewpoint neutrality was required.

the distinctions drawn are reasonable in light of the purpose served by the forum *and are viewpoint neutral*." (Emphasis added.) The Court in *Cornelius* held that "[w]hile we accept the validity and reasonableness of the justifications offered by petitioner for excluding advocacy groups from the [non-public forum], those justifications cannot save an exclusion that is in fact *based on the desire to suppress a particular point of view*." *Id.* at 812 (emphasis added). The Court then remanded the case to examine whether "the exclusion of respondents was impermissibly motivated by a desire to suppress a particular *point of view*." *Id.* at 812-13 (emphasis added). *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992) (observing that *Cornelius* and other cases permit "reasonable and *viewpoint-neutral* content-based discrimination in nonpublic forums") (emphasis added).[3]

Thus, taken together, *Hazelwood* and *Cornelius* permit content-based restrictions on government-sponsored speech in non-public forums only where such restrictions are viewpoint-neutral. Moreover, these cases are part and parcel of this Court's clear and unwavering censure of viewpoint discrimination in any forum. *See Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

---

[3]Even in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986), this Court emphasized that school officials' discipline of a student for giving a sexually suggestive campaign speech was *not* viewpoint discrimination. *See id.* at 685 ("the penalties imposed in this case were unrelated to any political viewpoint").

Accordingly, this Court should address and correct the Tenth Circuit's endorsement of viewpoint discrimination by granting *certiorari* on the first question in the petition.

II. The Tenth Circuit's Holding Exacerbates the Confusion Among the Circuits as to Whether *Hazelwood* Permits Viewpoint Discrimination.

Despite this Court's consistent censure of viewpoint discrimination and the seeming clarity of *Hazelwood* itself, confusion reigns among the Circuits as to whether *Hazelwood* permits viewpoint discrimination. The Tenth Circuit's holding in this case serves only to exacerbate this confusion and highlights the need for this Court to provide guidance to the lower courts concerning the breadth of students' free speech rights.

On the one hand, the Tenth Circuit's holding departs from the majority view of the Circuits. Specifically, the majority of the Circuits has held that, although *Hazelwood* provides some discretion to impose restrictions on the content and subject-matter of school-sponsored student speech, schools must still observe viewpoint-neutrality when censoring that speech.

For example, in *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989), the Eleventh Circuit held:

> Although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint. The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis. Without more explicit direction, we will continue to require school

> officials to make decisions relating to speech which are *viewpoint neutral*.

Id. at 1325 (first emphasis in original, second emphasis added, citations omitted); *see also Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800-01 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) ("In *Hazelwood* . . . , the Court recognized that public school officials could impose, consistently with the first amendment, reasonable restrictions upon the *subject matter* of a student-published newspaper.") (emphasis added); *Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (en banc) (holding that school newspaper, sporting event programs, and yearbook were school-sponsored, non-public fora under *Hazelwood* and *Cornelius,* and therefore "control over access . . . can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum *and are viewpoint neutral*.") (quoting *Cornelius*, 473 U.S. at 806) (emphasis added); *Brody v. Spang*, 957 F.2d 1108, 1122 (3d Cir. 1992) (holding that *Hazelwood* and *Cornelius* require censorship of school-sponsored student speech to be "viewpoint neutral" and remanding for inquiry into viewpoint neutrality); *Hedges v. Wauconda*, 9 F.3d 1295, 1298 (7th Cir. 1993) ("Even when the government may forbid a *category* of speech outright, it may not discriminate on account of the speaker's *viewpoint*[,] . . . [e]specially not on account of a religious subject matter, which the free exercise clause of the first amendment singles out for protection.") (emphasis added); *Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501 (8th Cir. 1994) (striking down policy prohibiting "any speech or activity involving religion or religious beliefs" in a nonpublic school forum because suppression was viewpoint-based); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719 (2d Cir. 1994) ("the Supreme Court has held that

educators may limit the *content* of school-sponsored speech so long as the limitations are 'reasonably related to legitimate pedagogical concerns,'") (citing *Hazelwood*) (emphasis added); *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1542 (7th Cir. 1996) ("suppression of a particular viewpoint" may be permissible if "there are compelling state and human interests at stake."); *Kincaid v. Gibson*, 191 F.3d 719, 727 (6th Cir. 1999) (*Hazelwood* prohibits any "viewpoint-based restriction on student speech") *rev'd and remanded on other grounds*, 236 F.3d 342 (6th Cir. 2001) (en banc).

On the other hand, other Circuits have taken the view, now joined by the Tenth Circuit in the case at bar, that *Hazelwood* permits viewpoint discrimination. *See Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (*Hazelwood* does "not require that school regulation of school-sponsored speech be viewpoint neutral"); *see also Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 467 (7th Cir. 2001) (suggesting that *Hazelwood* permits censorship of speech based on viewpoint where necessary to maintain "order and discipline."); *cf. C.H. v. Oliva*, 195 F.3d 167, 172-73 (3d Cir. 1998) (rejecting position that *Hazelwood* imposes a "requirement of viewpoint neutrality"), *reh'g en banc granted, opinion vacated,* 197 F.3d 63 (3d Cir. 1999), *aff'd by an equally divided court in part, vacated and remanded in part*, 226 F.3d 198 (3d Cir. 2000). Moreover, the Ninth Circuit, though noting its own prior precedent in *Planned Parenthood*, 941 F.2d at 817, holding that viewpoint neutrality is required under *Hazelwood*, recently called that holding into question. *See Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1010 (9th Cir. 2000) (asserting that there is no basis in *Hazelwood* for the conclusion that

viewpoint neutrality applies to censorship of "school-sponsored [student] speech").[4]

Nowhere, however, is the confusion among the Circuits concerning whether *Hazelwood* permits viewpoint discrimination better exemplified than in the torturous history of *C.H. v. Oliva*, the case on which the Tenth Circuit primarily relied in this case. At the trial court level, the court dismissed the student's viewpoint discrimination claim finding that the allegations did not show such discrimination. *See C.H. v. Oliva*, 990 F. Supp. 341 (D.N.J. 1997). The Third Circuit affirmed in an unpublished opinion, *see* 166 F.3d 1204 (3d Cir. 1998), but on rehearing, the same panel of the Third Circuit withdrew its prior opinion, this time finding that the speech had been censored because of its viewpoint, but nonetheless affirming on the basis that *Hazelwood* permitted viewpoint discrimination. *See C.H. v. Oliva*, 195 F.3d at 172-73. The *en banc* court then proceeded to vacate that opinion, *see* 197 F.3d 63 (3d Cir. 1999), but ultimately affirmed the dismissal of the student's viewpoint discrimination claim by an equally divided court, thereby leaving intact the confusion as to whether *Hazelwood* permits viewpoint discrimination. *See C.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000).[5]

In short, there is considerable confusion among the Circuits as to whether *Hazelwood* permits viewpoint discrimination, even to the extent of dividing one Circuit down-the-middle. The Tenth Circuit's opinion in this case

---

[4]The Ninth Circuit ultimately decided the case on other grounds.

[5]Undersigned counsel was counsel for the plaintiff in *C.H.*

only exacerbates that confusion. This Court should seize this opportunity to restore order to this important area of First Amendment jurisprudence by granting *certiorari* on the first question posed in the petition, and by making unmistakably clear that censorship of student speech based on viewpoint is not permitted under *Hazelwood.*

CONCLUSION

For the foregoing reasons, the writ of *certiorari* to the Tenth Circuit Court of Appeals should be granted with respect to the first question presented by Petitioners.

Respectfully submitted,

KEVIN J. HASSON
Counsel-of Record
ROMAN P. STORZER
ANTHONY R. PICARELLO, JR.
DEREK L. GAUBATZ
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Ave., N.W.
Suite 605
Washington, D.C. 20036
Phone: (202) 955-0095
Fax: (202) 955-0090

Attorneys for *amicus curiae*

December 13, 2002